PP

v.

CHIN SHIN THIAM

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH JC
[CRIMINAL APPEAL NO: 41-21-2004 III-(I)]
20 OCTOBER 2005

CRIMINAL PROCEDURE: *Trial - Acquittal and discharge - Acquittal of accused without hearing all evidence of prosecution - Whether prejudice caused - Power of magistrate - Reasons for decision - Undue delay - Criminal Procedure Code s. 173(c) & (f) - Penal Code ss. 420 & 511 - Federal Constitution art. 145(3)*

CRIMINAL PROCEDURE: *Appeal - Acquittal and discharge, against - Principle of stare decisis - Type of order - Prejudice, whether caused - Criminal Procedure Code s. 316(a)*

The respondent was charged under s. 420 read together with s. 511 of the Penal Code. The case was adjourned eight times before the trial started and the trial finally started after a lapse of some four years. When the trial started, only one witness was called for the prosecution although the prosecution had two other witnesses present in court and the reason for this was that the prosecution wanted to call the complainant before the two witnesses. Unfortunately, no other witnesses were called and the trial came to an end when the learned magistrate refused to allow any further adjournment and deemed the prosecution case closed. The learned magistrate then after considering the submissions made by the parties, gave an order of discharge and acquittal on 23 July 2004 ("said order") to the respondent. This is an appeal by the prosecution against the said order. There are two issues before this court and they are firstly, whether the learned magistrate had the power to acquit and discharge the respondent in circumstances where the prosecution had not had the opportunity of adducing all the evidence available to them and secondly, if the first question is answered in the negative, then what type of order is this court empowered to make under those circumstances.

Held (setting aside the said order of the learned magistrate and substituting it with an order that the respondent be discharged not amounting to an acquittal):

[1] This court is bound by the decision of the Supreme Court in *PP v. Mohamad Said* [1984] 1 MLJ 50. Learned counsel for the respondent in

fact conceded that the magistrate in this case had no power to discharge and acquit. As such I hereby set aside the learned magistrate's order of discharge and acquittal of the respondent. (p. 498 d)

[2] In my view, the prosecution would not be prejudiced if I were to substitute the learned magistrate's decision to one of discharge not amounting to an acquittal as they had only called one witness and could recharge the accused if they so deem fit. Taking into consideration all the factors of the case especially the fact that the learned magistrate is now stationed in West Malaysia, I hereby set aside the learned magistrate's order of discharge and acquittal and substitute it with an order that the respondent be discharged not amounting to an acquittal. (p. 499 f-h)

Case(s) referred to:
PP v. Zainuddin & Anor [1986] 2 MLJ 100 ***(refd)***
PP v. Mohamad Said [1984] 1 MLJ 50 ***(foll)***
Sallehuddin Yahaya [1979] 2 MLJ 138 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 316(a)
Evidence Act 1950, s. 33(1)(i)
Penal Code, ss. 420, 511

For the appellant - Yong Leon Shin, DPP
For the respondent - Lim Lian Kee; M/s LL Kee & Co

Reported by Sharmini Pillai

JUDGMENT

David Wong Dak Wah JC:
This is an appeal by the prosecution against an order of discharge and acquittal by the learned magistrate made on 23 July 2004 in respect of a charge under s. 420 of the Penal Code read together with s. 511 of the same code which reads as follows:

> That you on the 1 August 1998 at about 9.30a.m. at Credit Corporation (CCM) Malaysia, Jalan Abell, Kuching in the State of Sarawak, cheated one Melinda Chan Soo Keo (F) that you have consent of one Tan Sri William Tan Ho Choon to transfer his ie, Tan Sri William Tan Ho Choon ten (10) fixed deposit certificates valued at Ringgit Malysia One Million ie, at RM100,000 per share bearing number:
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> CCMB Fixed Deposit Certificate No 768776
> CCMB Fixed Deposit Certificate No 768777
> CCMB Fixed Deposit Certificate No 768778

CCMB Fixed Deposit Certificate No 768779
CCMB Fixed Deposit Certificate No 768780
CCMB Fixed Deposit Certificate No 768781
CCMB Fixed Deposit Certificate No 768782
CCMB Fixed Deposit Certificate No 768783
CCMB Fixed Deposit Certificate No 768784
CCMB Fixed Deposit Certificate No 768785

into your account and also induced her to effect that transfer, which the said Melinda Chan Soo Keo (F) would not have done, if she had not been so deceived and that you have thereby committed an offence of attempted cheating punishable under s. 420 of the Penal Code, read with s. 511 of the same code

Undisputed Facts

The respondent was first charged on 4 January 1999 where the magistrate fixed the trial on 5 July 1999. However the case never started until 26 March 2003. Between 4 January 1999 and 26 March 2003 there were eight adjournments for reasons stemming, *inter alia,* from change of counsel for the respondent, magistrates being unavailable and witnesses not being served with subpoena. When the case finally started on 26 March 2003, only one witness for the prosecution had testified and the prosecution after the aforesaid testimony of the aforesaid witness applied for an adjournment and the same was adjourned to 10 December 2003 on the request by the defense counsel for a longer period. However the case was not heard until 19 January 2004 but on that date the accused was not present, hence the trial had to be adjourned to 10 May 2004. On 10 May 2004 the accused was again not present as the warrant of arrest was not executed. The magistrate gave a final adjournment till 14 July 2004 on the ground that this is a pre 2000 case. On 14 July 2004, the prosecution asked for an adjournment as their witnesses were not present. The magistrate refused the adjournment on the following grounds:

1. No subpoena had applied for by the prosecution.
2. No witnesses present.
3. Last hearing was on 10 May 2004, therefore ample time for prosecution to apply for subpoena and serve them.
4. This is a pre 2000 case.

The learned magistrate then proceeded to deem the prosecution case closed and ordered parties to make written submissions on or before 19 July 2004. On 23 July 2004 the magistrate made the following ruling:

> Having heard the evidence of the prosecution witnesses, and having considered it by using the *prima facie* scale, I find that the prosecution has failed to prove a *prima facie* to its case. The court hereby order the accused to be discharged and acquitted (D&A)

Grounds Of Appeal

Three grounds were put forth by the prosecution and they are as follows:

1. The magistrate was wrong to deem the prosecution case closed where in fact the prosecution still has evidences to produce.

2. The magistrate was wrong in concluding that there was no evidence in court to prove that exh. P2 was signed by Tan Sri William Tan when he refused to give the prosecution the chance to adduce evidence under s. 33(1)(i) of the Evidence Act 1950.

3. The magistrate was wrong in concluding that there was no inducement proved.

Issues

I deal now with ground 1 which in effect deals with the learned magistrate's power to discharge and acquit when the prosecution had not the opportunity to adduce all the evidence available to them. Assuming that the learned magistrate's refusal to allow further adjournment of the case is correct, does the law allow the learned magistrate to discharge and acquit in the circumstance?

In the case of *PP v. Zainuddin & Anor* [1986] 2 MLJ 100, the Supreme Court dealt with the same issue. In that case the respondents/accuseds were first charged in 9 November 1976 but the case against them had been postponed no less than twelve times since then to the date when the magistrate ordered acquittal of the respondents/accused. The prosecution asked for revision but was rejected. The Supreme Court granted leave to have the following question determined:

> In view of the art. 145(3) of the Federal Constitution and s. 173(c) and (f) of the Criminal Procedure Code, whether it is right for a magistrate in a summary trial to acquit and discharge an accused without hearing any evidence of the prosecution

The Supreme Court overruled the case of *PP v. Mohamad Said* [1984] 1 MLJ 50 and held that magistrates have no power to discharge and acquit until such time that all available prosecution evidences have been produced in court. The

Supreme Court was crystal clear in overruling *PP v. Mohamad Said* (*supra*) as evident in the judgment of Salleh Abbas LP (as he then was) which reads as follows:

> He (Mohamed Azmi J in *Mohamad Said'*s case) thus based his ratio upon a narrow construction of para (c) of s. 173 of the Criminal Procedure Code ('the CPC'). This paragraph says:
>
> If the accused refuses to plead or does not plead or claims to be tried, the court shall proceed to hear the complainant (if any) and to take **'all such evidence as may be produced in support of the prosecution case**. (Emphasis added.)
>
> He construed the emphasized phrase to mean only **'all such available evidence as may be produced in support of the prosecution at the trial'** (again the emphasis added), thereby excluding the evidence which is not so available, even though such evidence is material and needed by the prosecution to support its case and as such a postponement is sought for in order to make it available. The result is, according to the learned judge's ruling that where material evidence (evidence in support of the prosecution) is not available at the trial the court may, by refusing adjournment, treat the case of the prosecution as at an end and acquit the accused under para (f) of s. 173 of the CPC.
>
> We do not accept this narrow construction as it is plainly contrary to the wording of para (f) which is as follows:
>
> > If, upon taking all the evidence hereinbefore referred to, the court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the court shall record an order of acquittal.
>
> Under this paragraph an order of acquittal can be recorded only (1) when 'all the evidence hereinbefore referred to' has been taken and (2) when the court finds no case against the accused 'has been made out which if unrebutted would warrant his conviction ... .
>
> When does the court make a finding as to whether a case against the accused is made out or not? Surely, at the close of the prosecution case. And what is the basis on which such a finding is made? The answer must be that the finding is made on the basis of 'all the evidence hereinbefore referred to.' Now what does this phrase mean? Whilst we accept the view of Mohamed Azmi J in that whatever this phrase means it must bear the same meaning as does the phrase 'all such evidence as may be produced in support of the prosecution case' appearing in para. (c), we do not however agree that these two phrases only mean 'such evidence as is available at the trial.' In our view, these phrases also include evidence not available on the date of the trial as long as such evidence is material and needed to support the prosecution case.
>
> Yet, if we accept the narrow construction in *Mohamed Said'*s case the court can acquit the accused at any stage irrespective of whether it has heard some evidence or none at all. Both cases - partly heard and not yet heard cases - are

> in the same position in that they run the risk of being frustrated by the court refusing an adjournment, necessitating the making of an order of acquittal if the evidence needed to support the prosecution case is not available on the day of the trial. This is plainly contrary to the decision in *Kuppusamy*'s case.
>
> In our view the court has no such power before the end of the prosecution case, whether the evidence has been given or not. The phrase 'all such evidence as may be produced' appearing in para. (c) of s. 173 of the CPC of course has the same meaning as the phrase 'all the evidence hereinbefore referred to' appearing in para. (f). But the evidence meant by these two phrases include both the evidence which is available at the trial and that which is not but will be made available if a postponement of the trial is granted ...
>
> In view of what we have said above, our answer to the question raised in this reference is that in a summary trial, paras. (c) and (f) of s. 173 of the CPC do not empower the court to order a discharge amounting to an acquittal of an accused person without hearing evidence of the prosecution in support of its case.

This court is bound by the judgment of the Supreme Court. Learned counsel for the respondent in fact conceded that the magistrate in this case had no power to discharge and acquit. As such I hereby set aside the learned magistrate's order of discharge and acquittal of the respondent.

The next matter which I need to deal with is the type of order I should make.

My power is governed by s. 316(a) of the Criminal Procedure Code which states as follows:

> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground to interfering, dismiss the appeal, or may
>
> (a) in an appeal from an order of acquittal, reverse such order, and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law.

In the case of *Sallehuddin bin Yahaya* [1979] 2 MLJ 138, Tan Chiaw Thong J made the following observations:

> It is clear that the discretion conferred upon an appellate court by s. 316 of the Criminal Procedure Code is, as already mentioned, discretionary. How that discretion is to be exercised would depend upon the particular cases would depend upon the particular circumstances if the particular cases coming before an appellate court. In the case of *Matukdhari Singh v. Jamardan* [1966] SC 356, 358 the Supreme Court of Indian ruled that is hardly necessary or desirable to state in a set formula and the formula and the observations of that court are illustrative but not exhaustive.

It should be mentioned here that the corresponding provisions the Indian Code of Criminal Procedure giving power to an appellate court to order a retrial are in substance similar to s. 316 of ours. It seems clear therefore on the authorities that where the appellate court considers in the interests of justice which do not prejudice the appellant, the appellate court has the discretionary power to order a retrial in an appeal In this respect, it would be just as well to remind oneself that:

> The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice mean only the interests of the prisoners, (per Lord Goddard CJ in the case of *Rex v. Grondkowski* [1946] 1 KB 369, 372 quoted with approval by the former Federal Court of Appeal in *Liew Kaling & Ors v. PP* [1960] MLJ 306, 309.

Reverting back to the present appeal, the case was adjourned eight times before the trial started. It was first mentioned on 4 January 1999 when the accused was charged and trial finally started only on 26 March 2003 after a lapse of some four years. And when the trial started only one witness was called despite the fact that the prosecution had two other witnesses present in court. The reason given for not calling those two witnesses was that they wanted to call the complainant before those two witnesses. Unfortunately no other witnesses were called and the trial came to an end on 14 July 2004 when the learned magistrate refused any further adjournment and deemed the prosecution case closed. I am informed that the learned magistrate has now been transferred to West Malaysia.

Learned DPP in her submission requested that I set aside the learned magistrate's order and order the trial to continue to allow the prosecution to finish their case. If I were to accede to her request, it would mean that there would be a formal request for the learned magistrate to return from West Malaysia and hear this case. This will no doubt further delay this case and this would be unfair to the accused. In my view, the prosecution would not be prejudiced if I were to substitute the learned magistrate's decision to one of discharge not amounting an acquittal as they had only called one witness and could recharge the accused if they so deem fit to do so.

So taking into consideration of the aforesaid factors especially the fact that the learned magistrate is now stationed in West Malaysia, I hereby set aside the learned magistrate's order of discharge and acquittal and substitute it with an order that the respondent be discharged not amounting to an acquittal. I leave it to the prosecution to decide their next course of action.

Should the prosecution decide to recharge the accused, it is this court's hope that the trial will be heard on a day to day basis until the same is completed.

In view of my ruling, it is not necessary for me to consider the other grounds in the petition of appeal.